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No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,
Petitioner,

v.

PEG BOUAPHAKEO, *et al.*, individually and on behalf of all other similarly situated individuals,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether differences among individual class members may be ignored and a class certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample.

2. Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class includes hundreds of members who were not injured and have no legal right to any damages.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to express its view that federal courts should certify cases neither as class actions under Rule 23 of the Federal Rules of Civil Procedure, nor as collective actions under the Fair Labor Standards Act, unless the plaintiffs can demonstrate that they have satisfied each of the requirements set forth in Rule 23 and the Fair Labor Standards Act. *See, e.g., Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). WLF has also repeatedly urged the judiciary to confine itself to deciding only true "Cases" or "Controversies" under Article III of the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing; blanket letters of consent have been lodged with the Court.

WLF is concerned that the decision below, by endorsing class certification based on estimates regarding the number of overtime hours a hypothetical "average" employee might have worked, deprives a defendant in a class or collective action of the right to litigate its statutory defenses to individual claims. Permitting class or collective claims to proceed in this manner is also unfair to those absent class members who worked more overtime hours than the "average" employee; under the appeals court's trial-by-formula approach, they may end up being undercompensated or even being classified as uninjured despite possessing evidence that they were not fully compensated for their overtime work.

WLF also supports this Court's edict that Fed.R.Civ.P. 23 must be interpreted in keeping with Article III constraints. The Eighth Circuit violated that edict when it upheld certification of a class that included hundreds of individuals whose claims for relief (under Respondents' own theory of the case) were wholly implausible and who thus lacked Article III standing

STATEMENT OF THE CASE

Respondents are current and former employees of Petitioner Tyson Foods, Inc. at Tyson's meat-processing facility in Storm Lake, Iowa. They allege that Tyson violated the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, and the nearly identical Iowa Wage Payment Collection Law (IWPCL), Iowa Code 91A.1 *et seq.*, by failing to fully compensate them (*i.e.*, failing to pay time-and-a-half) for all hours worked in excess of 40 hours per week.

In calculating compensable working time for its Storm Lake employees, Tyson includes all hours when employees are at their work stations and the production line is moving ("gang time"). Tyson also pays employees for the time it estimates they require to perform other work-related duties, including the donning and doffing of personal protective equipment (PPE). Respondents' lawsuit contends that those estimates are too low, that many employees require more than the estimated time to complete their donning and doffing. Respondents contend that they are entitled to additional overtime pay whenever the extra required work is performed during a week in which an employee has already worked 40 hours.[2]

It is undisputed that the quantity of PPE worn at the Storm Lake facility varies considerably from worker to worker, and thus that the time required to don and doff PPE also varies considerably. Tyson has adopted several measures designed to ensure that employees are fully compensated for their donning and doffing time as well as the time spent walking to their work locations. In particular, throughout the class period, Tyson daily paid from four to eight minutes of "K-Code time" to most class members to compensate for donning/doffing-related activities. Also, employees assigned to come in early to set up or to stay late to tear down remained "on the clock" during those assignments, and they had ample opportunity during

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[2] Storm Lake employees are paid well in excess of the minimum wage. Thus, Respondents do not claim that Tyson's alleged failure to compensate them for all work time constituted a violation of the minimum-wage provisions of the FLSA and the IWPCL.

that compensated time period to complete all donning, doffing, cleaning, and walking activities. Depending on their work assignments, some employees were able to don and doff PPE during "gang time," and thus the time they spent on those activities was already included in their compensated time. Some employees were required to clean equipment; others were not.

The considerable variation in time outside the regular work shift devoted by employees to donning and doffing would seem to preclude certification of a Rule 23(b)(3) class for Respondents' IWPCL claims (and of a collective action for their FLSA claims). Rule 23(b)(3) precludes certification unless "the questions of law or fact common to class members predominate over any questions affecting only individual members." The factual issues key to determining liability and damages—whether each employee spent more hours performing donning/doffing activity than the hours for which he was compensated and whether the employee worked more than 40 hours in any such week—would seem to require an individual-by-individual factual determination.

Respondents sought to avoid that problem by computing an average amount of time spent by each employee devoted to donning, doffing, and washing activity, based on a time study conducted by Dr. Kenneth Mericle. He observed a small sample of Tyson employees performing what he deemed to constitute donning, doffing, cleaning, and walking activity. Extrapolating that observation to all employees, he concluded that the *average* class member spent between 18 and 21.25 minutes each work day (depending on the department in which he worked) on

donning/doffing/cleaning/walking activity.[3] Another of Respondents' experts, Dr. Liesl Fox, examined Tyson's time records to see which employees had worked overtime. Based on Dr. Mericle's conclusions regarding the "average" employee, Dr. Fox calculated what she believed was the additional overtime compensation owed by Tyson to each member of the class and, thus, to the class as a whole. Her study identified several hundred employees (and putative class members) who—even accepting that they spent Dr. Mericle's "average" number of minutes each work day performing compensable donning and activities—had been fully compensated by Tyson in compliance with the FLSA and the IWPCL.

In the district court, Tyson repeatedly voiced its objection to class certification, arguing that any effort to prove class-wide liability on the basis of Dr. Mericle's time study amounted to "trial by formula" and prevented it from litigating its defenses to individual claims. The district court nonetheless certified a Rule 23 class that now contains 3,334 members, and conditionally certified an FLSA collective action that now contains 444 members. It also denied Tyson's repeated efforts to decertify. The jury found Tyson liable for failing to pay all required overtime for time spent on donning and doffing activity and awarded $2.9 million in damages to the class as a

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[3] Dr. Mericle readily conceded wide variations in individual donning and doffing time (because some employees were required to wear considerably more PPE than others and because completion times vary based on the manner in which PPE is donned and doffed), with some employees requiring considerably less than the "average" time to complete the activity.

whole. After trial, the district court denied Tyson's renewed objections to class certification and for judgment as a matter of law, finding that the testimony of Dr. Mericle and Dr. Fox provided sufficient evidence upon which the jury could base class-wide findings of liability and damages. Pet. App. 25a-30a.

A divided Eighth Circuit panel affirmed. *Id.* at 1a-24a. The appeals court conceded that "individual plaintiffs varied in their donning and doffing routines." *Id.* at 8a. It nonetheless held that Dr. Mericle's study created a "just and reasonable inference" that *all* class members had established Tyson's liability for underpayment of overtime wages, *id.* at 12a, with variations among class members existing only with respect to damages. *Id.* at 13a. Rejecting Tyson's assertion that Dr. Mericle's study was incapable of providing a class-wide answer to the liability and damages questions, the court said that "using statistics or samples in litigation is not necessarily trial by formula." *Id.* at 10a-11. It cited this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 546 U.S. 21 (1946), to support its conclusion that the jury could infer both class-wide liability and damages from the study. *Id.* at 11a-13a.

Nor did the Court deem it significant that Respondents' own expert, Dr. Fox, concluded that a significant percentage of the plaintiff class did not work overtime (even when Dr. Mericle's "average" donning, doffing, washing, and travel time were added to their time records) and thus could not establish liability or damages. *Id.* at 8a-9a. Rejecting Tyson's argument that Rule 23 precludes certification of a class

that includes concededly uninjured plaintiffs, the court said, "The fact that individuals will have claims of differing strengths does not impact on the commonality of the class as structured." *Id.* at 9a (citation omitted).

Judge Beam dissented. *Id.* at 14a-24a. He concluded that the class- and collective-action certifications were improper because—in light of the wide disparity in work performed by class members—a class-wide proceeding lacked "the capacity to generate common answers apt to drive the resolution of the litigation." *Id.* at 23a (quoting *Wal-Mart*, 131 S. Ct. at 2251). He noted that, according to Respondents' own calculations, at least 212 class members could establish neither liability nor damages, and said that—given the jury's decision to award less than half the damages computed by Dr. Fox—it was likely that "more than half of the putative class suffered either no damages or only a de minimis injury." *Id.* at 22a. The Eighth Circuit denied Tyson's petition for rehearing *en banc*; five judges voted to grant the petition. *Id.* at 114a.

SUMMARY OF ARGUMENT

The Eighth Circuit held that even when the claims of individuals are widely disparate, a trial court may manufacture a common issue of fact by assuming that each individual's claims are identical to a hypothetical "average" plaintiff, and then base certification of class or collective actions on the manufactured common issue of fact. That holding violates Rule 23(b)(3) and FLSA collective action requirements by permitting certification even when, as here, individual issues of fact and law overwhelm

common issues. It is unfair to defendants because it denies them the opportunity to defend against actual, individual claims rather than the claims hypothesized by the trial court. It is also often unfair to absent class members, many of whose claims will end up being compromised for the sake of obtaining class certification.

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Departure from that general rule is permissible only when the requirements of Rule 23 have been met—requirements designed to ensure that the rights of all parties are fully protected and that certification does not modify existing rights. Those requirements were not satisfied in this case because "the questions of law or fact common to class members" did not "predominate over any questions affecting only individual class members." Rule 23(b)(3).

By permitting this case to proceed as though (contrary to fact) the claims of all class members were identical to those of a hypothetical, "average" class member—thereby preventing Tyson from defending against the claims of individual class members—the Eighth Circuit violated the Rules Enabling Act, which forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). The appeals court disregarded the terms of this Court's *Wal-Mart* decision, which expressly protected a class-action defendant's right to raise all defenses to the actual claims of individual plaintiffs.

Furthermore, the inferences that the appeals court sought to draw from Dr. Mericle's non-random observations of a small number of Tyson employees were unwarranted. When considered on an individualized basis, evidence that one employee took 20 minutes to perform a given task may sometimes support an inference that a second employee also took 20 minutes to perform the identical task when faced with identical working conditions. But this Court has never permitted *class-wide* factual issues to be determined on the basis of such inferences. Drawing inferences of this nature regarding the amount of time that every member of a class devoted to specified work activities is particularly inappropriate when, as the courts below readily conceded was true in this case, differing working conditions experienced by Tyson employees meant that their claims for additional overtime pay varied considerably from employee to employee.

The judgment should be reversed on the additional ground that the courts below could not properly exercise subject-matter jurisdiction over a certified class that included hundreds of individuals who lacked Article III standing. A federal court lacks jurisdiction over a claim when it is so insubstantial or implausible as not to involve a federal controversy. Respondents' own evidence establishes the utter implausibility of the claims of more than 200 class members. According to the expert reports on which Respondents rely as their basis for asserting the predominance of common issues of fact over individual issues, Tyson is not liable to those employees because company time records establish that they performed no uncompensated overtime work even if they are credited

with the "average" additional donning, doffing, and walking time computed by Dr. Mericle.

The identity of those 212 class members who lacked standing (because of the implausibility of their claims of injury) was readily ascertainable from Dr. Fox's expert report and thus could have been explicitly excised from the class without difficulty. The district court nonetheless ruled (over Tyson's objections) that a class including those 212 employees should be certified. Because Rule 23 may not be applied in a manner that impermissibly expands the judicial authority conferred by Article III of the Constitution, the judgment for the class must be reversed.

The Eighth Circuit asserted that inclusion of class members who lacked standing was irrelevant because the district judge instructed the jury that it should not award damages to "[a]ny employee who has already received full compensation for all activities." Pet. App. 10a. That assertion is doubly flawed. First, it does not excuse the unwarranted exercise of subject-matter jurisdiction over an improperly constituted class. Second, because the jury returned a general verdict that did not specify which members of the class established Tyson's liability, there is no way to determine whether the jury intended to award damages to the class members who lacked standing.

There is no constitutional basis for permitting the district court on remand to undertake its own allocation of the damages award. Moreover, permitting such an undertaking would be unfair not only to Tyson but also to absent class members. For example, class

members determined by Drs. Mericle and Fox not to be entitled to any compensation might well contend that they were, in fact, undercompensated because they devoted considerably more time to donning, doffing, and washing activities than did Dr. Mericle's hypothetical "average" employee. Once Respondents determined that they would seek class certification under a theory that precluded all possibility of recovery for 212 employees, it was incumbent on them to exclude those employees from the class in advance of trial—thereby permitting those employees, if they so desired, to seek relief on their own.

ARGUMENT

I. CLASS CERTIFICATION IS IMPROPER WHERE THE ONLY COMMON ISSUE TYING TOGETHER DISPARATE CLASS MEMBERS IS THE HYPOTHESIZED DESCRIPTION OF AN "AVERAGE" CLASS MEMBER

The Eighth Circuit certified a plaintiff class consisting of more than 3,300 employees seeking to recover overtime wages, despite wide variations among the employees in terms of hours worked and working conditions. Indeed, the relevant issues identified by the Eighth Circuit as common to the class were not contested and thus did not need to be adjudicated by the district court.[4] The appeals court held that the

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[4] In an effort to distinguish *Wal-Mart*, the Eighth Circuit identified the following issues that supposedly tied the class together: "Unlike [*Wal-Mart*], Tyson had a specific company

paucity of significant common issues could be overlooked and a class certified on the basis of a counter-factual presumption: that every class member engaged in the same amount of donning, doffing, and walking as the "average" employee. Respondents were then permitted to demonstrate the amount of work performed by the "average" employee based on non-random observations of a small sample of employees. That holding cannot be squared with *Wal-Mart*. Tyson could not defend itself by demonstrating that it adequately compensated each of its employees—a defense guaranteed by Rule 23, *Wal-Mart* tells us, 131 S. Ct. at 2541—when the benchmark standard established by the district court was whether Tyson had adequately compensated a hypothetical "average" employee created by Dr. Mericle.

A. The Class-Wide Issue that Served as the Basis for Class Certification Focused on a Hypothetical "Average" Employee

To obtain class certification in a case seeking damages (as here), a plaintiff must demonstrate, *inter alia*, that "there are questions of law or fact common to the case," Rule 23(a)(2), and that "questions of law or

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policy—the payment of K-code time for donning, doffing, and walking—that applied to all class members. Unlike [*Wal-Mart*], class members worked at the same plant and used similar equipment." Pet. App. 8a. Those factual issues were uncontested by the parties. Indeed, uncontested issues such as whether putative class members all worked for one company were singled out in *Wal-Mart* as precisely the sort of issues that do *not* qualify as common issues for purposes of Rule 23(a)(2). *Wal-Mart*, 131 S. Ct. at 2551.

fact common to class members predominate over any questions affecting only individual members." Rule 23(b)(3). *Wal-Mart* made clear that the Rule 23(a)(2) "commonality" requirement is demanding:

> Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. . . . Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 131 S. Ct. at 2551.

The Court has described Rule 23(b)(3)'s predominance requirement as "even more demanding than Rule 23(a)." *Comcast Corp. v. Behrend*, 133 S. Ct. at 1432. It imposes on courts a "duty to take a close look at whether common questions predominate over individual ones." *Ibid.*

Individual issues abound in this case. All parties agree that the number of hours—outside of regular work shifts—devoted to donning, doffing, and washing by Storm Lake employees varied considerably from employee to employee. Moreover, whether such

work entitled a given employee to overtime compensation depended entirely on whether that employee otherwise worked 40 or more hours during the week in question. Furthermore, throughout the class period, Tyson daily paid from four to eight minutes of "K-Code time" to most (but not all) class members to compensate for donning/doffing-related activities. Those individual issues of fact determine whether Tyson is liable to an employee for unpaid wages and, if so, what amount of damages are recoverable.

In contrast, the Eighth Circuit did not cite any issues of contested fact that are common to the class in the sense that their resolution "will resolve an issue that is central to the validity of each one of the claims in one stroke," *Wal-Mart*, 131 S. Ct. at 2551, and there are exceedingly few. Instead, the court presumed counter-factually that every employee performed the same amount of donning, doffing, and washing outside of regular work shifts, thus permitting the class trial to turn on whether Tyson had paid sufficient overtime wages to the hypothetical average employee.

The inevitable consequences of that presumption include: (1) some class members who devoted fewer hours to compensable donning, doffing, and washing than the hypothetical employee could prevail at trial despite never having worked more than 40 hours in any given week; and (2) some class members who devoted an above-average number of hours to compensable donning, doffing, and washing could be denied all recovery despite having worked more than 40 hours in a week. Even if it were accurate to

assert—and it is not—that the net result to Tyson is the same (*i.e.*, that the amount by which the class-wide judgment requires Tyson to overcompensate some class members roughly approximates the amount by which the judgment allows Tyson to undercompensate other class members), this Court has never permitted class actions to proceed on the theory that "it all comes out in the wash."

B. The Eighth Circuit's Class Certification Decision Cannot Be Squared With *Wal-Mart*

The effect of class certification in this case was to deprive Tyson of the ability to litigate its statutory defenses to individual claims. Once the district court held that Tyson's liability to the entire class turned on whether Tyson had paid sufficient overtime to the hypothetical average employee, it could no longer avoid liability by demonstrating that class counsel had failed to demonstrate that specific class members were inadequately compensated. As Tyson has explained, "In a class trial, . . . Tyson was reduced to attacking the methodology used by plaintiffs' experts to determine the 'average' donning/doffing time." Pet. at 23.

The Court explained in *Wal-Mart* that class certification under such circumstances amounts to an impermissible "Trial by Formula." 131 S. Ct. at 2541. Under a trial plan approved by the Ninth Circuit in *Wal-Mart*, a master was to determine the liability and backpay claims of a small group of class members. The trial court would then extrapolate "the entire class recovery" (for a class of 1.5 million employees) from the

verdicts rendered in those initial proceedings. In other words, Wal-Mart would not be permitted to contest the remaining 1.5 million claims by asserting that it did not discriminate against the specific employees in question. *Id.* This Court held that Rule 23 class certification could not be employed in that manner. It stated, "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive rights,' 28 U.S.C. § 2072(b), a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*

In an effort to distinguish *Wal-Mart*, the Eighth Circuit said, "Here, plaintiffs do not prove liability only for a sample set of class members. They prove liability for the class as a whole, using employee time records to establish individual damages." Pet. App. 10a. That effort to distinguish *Wal-Mart* is unavailing because it is based on a false premise: Respondents do, in fact, seek to "prove liability only for a sample set of class members." Plaintiffs' claims rest entirely on Dr. Mericle's time study that purported to determine average donning and doffing time, and that study was based on a small, non-random sample of Tyson employees. Only by adding Dr. Mericle's average donning and doffing time to employee time records were plaintiffs in a position to assert that Tyson failed to pay employees all the overtime (*i.e.*, time-and-a-half) wages to which they were entitled.

A recent post-*Wal-Mart* appeals court decision illustrates the impropriety of class certification in overtime-wage cases where hours worked by the

"average" employee is alleged to be a common issue of fact. In *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), the Seventh Circuit affirmed class decertification in a case brought by individuals claiming that their employer failed to pay them time-and-a-half for overtime work. The Court concluded that Rule 23(b)(3) did not permit class counsel to litigate the claims of 2,341 putative class members based on the testimony of 42 "representative" members of the class—in part because there was no evidence that the experiences of the 42 were representative of the class as a whole. *Id.* at 774.

Moreover, the Seventh Circuit held that class certification would be inappropriate *even if* their experiences were representative of the entire class because it is impermissible to award averaged damages to class members whose damages are not identical:

> To extrapolate from the experience of the 42 to that of the 2341 would require that all 2341 have done roughly the same amount of work, including the same amount of overtime work, and had been paid the same wage. No one thinks there was such uniformity. And if the average number of overtime hours per class member per week was 5, then awarding 5 x 1.5 x hourly wage to a class member who had only 1 hour of overtime would confer a windfall on him, while awarding the same amount of damages to a class member who had 10 hours of overtime would (assuming the same hourly wage) undercompensate him by half.

Id. As *Espenscheid* well illustrates, using Rule 23 in the manner approved by the Eighth Circuit violates the Rules Enabling Act because it enlarges the rights of some class members while reducing the rights of other class members.

C. *Mt. Clemens* Did Not Authorize Reliance on Sampling Evidence as a Basis for Class Certification

To support its contention that an inference of class-wide liability could properly be drawn from Dr. Mericle's non-random observations of a small subset of employees, the Eighth Circuit relied heavily on this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). According to the appeals court, *Mt. Clemens* authorized courts hearing wage-and-hour claims to draw all "reasonable inferences" regarding the work experience of all employees from the evidence of individual employees; it asserted, "For the donning, doffing, and walking in *Mt. Clemens*, testimony from eight employees established liability for 300 similarly situated employees." Pet. App. 11a.

The Eighth Circuit misinterpreted *Mt. Clemens*. Nothing in that decision authorizes courts to infer that *all* class members devoted a specified number of minutes to uncompensated donning and doffing activity based on evidence that *some* employees performed such activity—particularly where, as here, the plaintiffs' own evidence demonstrates significant variation from employee to employee. At issue in *Mt. Clemens* was the *legal* issue of whether employees' donning, doffing, and walking time was compensable at all under the FLSA,

not (as here) the *factual* question of how much donning, doffing, and cleaning took place.

Mt. Clemens: Walking Time. The Court was not required to draw any class-wide factual inferences in order to determine that the time employees spent walking on the employer's premises (from the spot at which they entered the factory to their work stations) was compensable because it was *undisputed* that all employees were required to engage in at least several minutes of on-premises walking. The Court determined as a matter of law that "time necessarily spent by the employees in walking to work on the employer's premises" was compensable "working time" under the 1946 version of the FLSA. *Id.* at 691.[5]

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[5] The Court remanded the walking-time issue for a determination of the amount of compensation, if any, to which employees were entitled. *Id.* at 692. The Court cited evidence that most employees required only several minutes to reach their work stations, held that the FLSA does not require compensation for "de minimis" walking time, and concluded:

> The de minimis rule can doubtless be applied to *much of the walking time* involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

Ibid (emphasis added). The Court's use of the phrase "much of the walking time" is a clear indication that it expected the lower courts on remand to make employee-by-employee determinations regarding the amount of time devoted to a given activity, not to presume that all employees devoted the same amount of time to the activity as did a hypothetical "average" employee. If the Court had contemplated that the lower courts would presume a uniform

Mt. Clemens: Donning and Doffing Time. Similarly, the Court's discussion of FLSA compensation for donning and doffing time focused solely on issues of law, not disputed factual issues. In particular, the Court never addressed whether evidence introduced by several employees regarding *their own* experiences could be used to demonstrate that *other* employees also devoted time to donning and doffing. It simply directed the trier of fact on remand "to draw whatever reasonable inferences can be drawn from the employees' evidence." *Id.* at 693.

The issue before the Court was the legal sufficiency of the admittedly thin donning-and-doffing evidence presented by employees who testified at trial. The Court held—and all apparently agreed—that the sorts of "preliminary activities" in which the plaintiffs *alleged* they had engaged was compensable under the FLSA because "[t]here is nothing in such activity that partakes only of the personal convenience or needs of the employees." *Ibid.* The only disputed issue was whether the evidence submitted by the plaintiffs was sufficient to demonstrate that at least some employees had engaged in more than a de minimis amount of such activity.

The special master to whom the case was referred for trial concluded that the plaintiffs' evidence—which apparently did not include documentary evidence—was insufficient to demonstrate their claimed damages with the "degree of

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measure of time per activity for all employees, then the de minimis rule would have applied either to *all* walking time or to *none* of it.

reliability or accuracy" necessary to establish either liability or damages. *Ibid.* The Supreme Court disagreed, concluding that if employees could not recover damages in the absence of detailed evidence demonstrating the time they devoted to preliminary activities, employees would effectively "be barred from their statutory rights." *Ibid.*

Thus, the Eighth Circuit's contention that "testimony from eight employees established liability for 300 similarly situated workers" is a highly inaccurate description of the Court's holding in *Mt. Clemens*. The Court overturned a judgment in favor of the employer because the lower courts had imposed an overly stringent, "improper standard of proof" on the FLSA plaintiffs. *Id.* at 686. It also reversed because, it held as a matter of law, an employee is entitled to compensation for time (excepting de minimis amounts of time) that he is required to spend walking on his employer's premises before arriving at his work station. *Id.* at 691. *Mt. Clemens* did *not* hold that the plaintiffs' evidence was sufficient to "establish[ ] liability for 300 workers," or for *any* workers. To the contrary, the Court explicitly stated that the employer was entitled on remand to attempt to show the absence of any liability, on the theory that "the de minimis doctrine" precluded a determination that it had violated the FLSA. *Id.* at 694.

More importantly for purposes of this case, nothing in *Mt. Clemens* supports the Eighth Circuit's claim that courts may infer that all employees are entitled to damages under the FLSA based on evidence that other employees (or a hypothetical "average'

employee) are entitled to damages. *Mt. Clemens* said nothing more than that "it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence as to the amount of time spent in these activities in excess of the productive working time." *Id.* at 693. There is nothing "reasonable" about presuming that an absent class member worked a specified number of uncompensated overtime hours based solely on evidence that some other employees may have worked a similar number of uncompensated overtime hours.

When considered on an individualized basis, evidence that one employee took 20 minutes to perform a given task may sometimes support an inference that a second employee also took 20 minutes to perform the identical task when faced with identical working conditions. But before a court could determine that such an inference was reasonable, it would need to closely examine the facts involving the two employees to ensure that the working conditions really were identical. Accordingly, such inferences are never appropriate in the context of class actions, because the need to closely examine every employee's working conditions would run up against Rule 23(b)(3)'s predominance requirement. That is, individual issues of fact would overwhelm any common issues of fact.

The effort to draw such inferences in the class-action context reaches an absurd level when, as here, it is conceded that differing working conditions experienced by employees mean that the amount of time devoted to donning, doffing, and walking (as well as the amount of compensation already paid for such

activities) varies considerably from employee to employee. It is wholly unreasonable to infer that a Tyson employee whose working conditions differed markedly from most other employees nonetheless devoted an "average" number of hours to donning, doffing, and walking.

Both Respondents and the Eighth Circuit rely heavily on the fact that Tyson does not record the amount of time that each employee devotes to donning, doffing, and walking. *See, e.g.*, Pet. App. at 12a (noting that "Tyson has no evidence of the specific time each class member spent donning, doffing, and walking," and concluding that "when an employer has failed to keep proper records, courts should not hesitate to award damages based on the just and reasonable inference from the evidence presented."). That argument contains a kernel of plausibility with respect to *individual* claims. Assuming for the sake of argument that the FLSA really required Tyson to separately record the number of hours that its employees devoted to donning and doffing, *Mt. Clemens* may support an argument that any employee seeking to press an individual FLSA claim should not be subject to an overly stringent evidentiary burden.

On the other hand, the Court has never suggested that a reduced evidentiary burden should apply to the issue of whether a class should be certified. "[A] plaintiff seeking certification under Rule 23 bears the burden of proof with regard to all elements of" his claim. *Amgen v. Conn. Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1212 (2013). A class action "may only be certified if the trial court is

satisfied, after a *rigorous analysis*," that the prerequisites of Rule 23 have been satisfied. *Gen'l Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982) (emphasis added). Accordingly, Tyson's failure to maintain more detailed employee time records has no bearing on whether the trial court erred in certifying this case as a class and collective action. Indeed, there is no reason to conclude that more detailed time records would have strengthened Respondents' Rule 23(b)(3) argument that common issues of fact and law predominate over individual issues. We suspect, to the contrary, that more detailed records would only have highlighted the starkly different working conditions experienced by Tyson employees.

II. CLASS CERTIFICATION IS IMPROPER WHEN THE CLAIMS OF SOME CLASS MEMBERS ARE IMPLAUSIBLE AND THUS THOSE MEMBERS LACK STANDING

According to the damages model used by Respondents as their basis for class certification, the injury claims of 212 members of the plaintiff class are utterly insubstantial and implausible. It is well established that a plaintiff who fails to assert a plausible federal cause of action lacks Article III standing to invoke a federal court's jurisdiction. That requirement does not change in the class-action context.

The identity of these 212 class members was easily ascertainable from the wage calculations undertaken by Dr. Fox, and thus they could have been explicitly excluded from the class. The district court

nonetheless certified the class and repeatedly denied Tyson's objections that Rule 23 precludes certification of a class that contains absent class members who were not injured and thus lack standing. This Article III standing issue raises an independent basis for reversing the judgment below.

A litigant lacks Article III standing, and a federal court lacks subject-matter jurisdiction over the litigant's claim, whenever the claim is "so insubstantial, implausible, foreclosed by prior decisions of the Court or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). It is difficult to conceive of claims that are more insubstantial or implausible than claims for overtime compensation asserted by individuals who admittedly did not work overtime.

This Court has repeatedly stated that "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)). Rule 23(a)(2)'s commonality requirement and Rule 23(b)(3)'s predominance requirement cannot reasonably be deemed satisfied when a certified class contains hundreds of members who lack Article III standing. Any other interpretation of Rule 23 is foreclosed, because a federal rule cannot authorize the federal courts to exercise powers that Article III of the Constitution prohibits them from exercising. As the

Court has explained:

> [F]ederal courts, in adopting rules, [are] not free to extend or restrict the jurisdiction conferred by a statute. Such a caveat applies *a fortiori* to any effort to extend by rule the judicial powers of the United States described in Article III of the Constitution. The Rules, then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III.

Willy v. Coastal Corp., 503 U.S. 131, 135 (1992).

Only one conclusion is possible: over Tyson's objections, this case went to trial with a certified plaintiff class that included more than 200 members over whom the district court lacked subject-matter jurisdiction. Plaintiffs generally need not, at the class certification stage, provide evidentiary support for the allegations contained in their complaint. *Amgen*, 133 S. Ct. at 1195. It is quite another matter, however, when the plaintiffs' own court filings affirmatively demonstrate that class members have not been injured. According to the experts put forward by Respondents to support class certification, the 212 class members in question never worked more than 40 hours in any week during the class period, even after adding Dr. Mericle's "average" donning and doffing time to their work records (as Dr. Fox did in connection with her expert report). Because (according to Dr. Fox's calculations) they never worked overtime, they do not have (and never had) a plausible basis for asserting Tyson's liability to them under either the FLSA or the IWPCL.

The Eighth Circuit asserted that inclusion of class members who did not claim injury (and thus lacked standing) was irrelevant because the district judge instructed the jury that it should not award damages to "[a]ny employee who has already received full compensation for all activities." Pet. App. 10a. But a jury instruction on damages does not excuse the unwarranted exercise of subject-matter jurisdiction over an improperly constituted class.

Moreover, there is no way to determine whether the jury based any of its award on the damages claims of the 212 class members who lacked standing. The jury found Tyson liable on the class claims and awarded the class $2.9 million in damages. That award was significantly less than one-half of the damages requested by Respondents. Given the jury's general verdict and the verdict's lack of a logical relationship to any specific claims asserted by the class, there is no way to determine how the jury intended its award to be distributed. The judgment must be reversed in full in light of the significant possibility that some portion of its award was intended to benefit class members who lacked Article III standing. *See Gasoline Prods. Co. v. Champlin Ref. Co*, 283 U.S. 494, 497 (1931) (Seventh Amendment prohibits setting aside only a portion of a jury verdict).

Indeed, any effort to reform the verdict would be unfair not only to Tyson but also to absent class members. For example, the 212 class members identified by Dr. Fox as not having worked overtime (and thus not entitled to compensation) may not agree with her assessment. Dr. Fox based her finding on a

counter-factual presumption: that all of the 212 employees devoted the precise number of hours to donning, doffing, and cleaning as did the "average" employee. She determined that none of the 212 employees were entitled to overtime compensation because their work hours remained below 40 hours per week even after the "average" donning, doffing, cleaning, and walking time was added to time listed in Tyson's records. If any of those employees have evidence that they devoted considerably more time to those activities than Dr. Mericle's "average" employee, they might well possess a valid claim for overtime. But if the class award is upheld, they likely would be precluded from filing such a claim.

Once Respondents determined that they would seek class certification under a theory that precluded all possibility of recovery for 212 employees, it was incumbent on them to exclude those employees from the class in advance of trial—thereby permitting those employees, if they so desired, to seek relief on their own.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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